

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION, a
Washington Corporation,

Plaintiff,

v.

COMMUNICATIONS & DATA SYSTEM
CONSULTANTS, INC., dba COMPUTER
BAY, an Indiana corporation,

Defendant.

CASE NO. C15-0497 RSM

ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS

I. INTRODUCTION

This matter comes before the Court on Defendant's Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(2) for lack of personal jurisdiction and/or 12(b)(3) for improper venue. Dkt. #24. Defendant argues that this Court lacks personal jurisdiction over it because it is a non-resident corporation that lacks sufficient minimum contacts with the State of Washington, and that venue is improper when Defendant has had no contacts with this District. *Id.* Defendant further argues that the Complaint should be dismissed under Rule 12(b)(6) on an estoppel theory.¹ *Id.* Plaintiff responds that it has met the minimum threshold for demonstrating specific jurisdiction in this Court. Dkt. #29. Plaintiff also responds that a

¹ Defendant also seeks monetary sanctions on the basis that Plaintiff has sued the wrong entity. Dkt. #31. Because the request for sanctions was not raised until Defendant filed its Reply brief, Plaintiff has not had the opportunity to address that issue.

1 motion to dismiss based on the affirmative defense of estoppel is improper at this time. *Id.* For
2 the reasons set forth below, this Court now GRANTS Defendant's motion to dismiss.

3 II. BACKGROUND

4 Plaintiff develops, distributes, and licenses various types of computer software,
5 including operating system software (such as Microsoft Windows) and productivity software
6 (such as Microsoft Office). Dkt. #16 at ¶¶ 14–18. Microsoft holds registered copyrights in the
7 various different versions of these products, and has registered trademarks and service marks
8 associated with the products. *Id.* ¶¶ 14-19.

10 Microsoft has implemented a wide-range of initiatives to protect its customers and
11 combat theft of its intellectual property, including its product activation system, which involves
12 the activation of software through product keys. *Id.* ¶ 25. A Microsoft product key is a 25-
13 character alphanumeric string generated by Microsoft and provided either directly to
14 Microsoft's customers or to Microsoft's original equipment manufacturer ("OEM") partners.
15 *Id.* ¶¶ 26-29. Generally, when customers or OEMs install Microsoft software on a device, they
16 must enter the product key. *Id.* Then, as part of the activation process, customers and/or
17 OEMs voluntarily contact Microsoft's activation servers over the Internet and transmit the
18 product keys and other technical information about their device to the servers. *Id.* Because
19 Microsoft software is capable of being installed on an unlimited number of devices, Microsoft
20 uses the product activation process to detect piracy and protect consumers from the risk of non-
21 genuine software. *Id.* Microsoft alleges that for some time, Defendant's IP address has been
22 used to activate numerous Microsoft product keys. *Id.* at ¶¶ 34-38.

26 Defendant, Computer Bay, is a resident of Indiana. Dkt. #15 at ¶¶ 2-3. Plaintiff alleges
27 that Computer Bay builds, customizes, repairs, and sells brand-name personal computers,
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1 printers, video surveillance systems, and computer parts and accessories. Dkt. #16 at ¶ 6.
2 According to Defendant, since well before 2012, Computer Bay's store and affiliated websites
3 were not and are not now related in any way to any other physical store, website, or entity
4 located elsewhere in the United States and Canada. Dkt. #34 at ¶ 6. Computer Bay's store is
5 located at 111 East Joliet Street in Schererville, Indiana, and is its only physical place of
6 business. *Id.* at ¶ 3.

8 Computer Bay's advertising, sales, and services are directed towards a small area
9 around the store's physical location and portions of nearby states. Dkt. #15 at ¶ ¶ 13 and 15.
10 Computer Bay does not sell products or services to Washington consumers. *Id.* at ¶ 10.
11 Computer Bay has a total of eight employees. *Id.* at ¶ 19. Joy Sporleder is the President and
12 Secretary of Communications, Eric Cox is the Vice President in charge of sales and purchasing,
13 and Computer Bay's other employees include four service technicians, one salesperson, and a
14 seasonal clerical worker. *Id.* at ¶ ¶ 2 and 19. These eight people all reside in Indiana and travel
15 only within a relatively small and localized area around the storefront on behalf of the business.
16 *Id.* at ¶ 19.

19 Computer Bay has never had any offices, bank accounts, post office boxes, employees
20 working in or visiting Washington for business-related purposes, or owned or controlled any
21 property in Washington. *Id.* at ¶ ¶ 5–7. Computer Bay has no agent for service of process
22 anywhere in Washington. *Id.* at ¶ 9. Computer Bay's services and products have never been
23 sold or shipped to Washington, nor is Computer Bay licensed or registered to conduct business
24 in Washington. *Id.* at ¶ ¶ 10–11.

26 Computer Bay has never advertised or solicited business in Washington. *Id.* at ¶ 12. Its
27 own website is passive. It merely displays basic contact information, presents information
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1 about the products Computer Bay offers for sale, and provides information about computer-
2 related services and special offers. *Id.* at ¶ 14. Potential consumers viewing the Computer Bay
3 website cannot make online inquiries about products, conduct an online chat session with a
4 service representative, actively request on-site product service or upgrades, set up an account,
5 or use an online “shopping cart” or other means to procure products or services. *Id.* Computer
6 Bay offers remote diagnostic services only for established customers, none of whom are in
7 Washington. *Id.* Therefore, Washington consumers cannot buy or obtain Computer Bay’s
8 products or services through its website. All efforts on the website are directed towards
9 providing customers with pre-written product information so that they can eventually call the
10 listed phone number or visit the store in person to transact business.
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13 Similarly, Computer Bay’s web sites on Yelp, Yahoo, Twitter and Facebook are
14 entirely passive. Dkt. #25 at ¶ ¶ 3 and 5–8 and Exs. 1–4. They do not support live inquiries
15 about products, allow online chat sessions with a service representative, permit active requests
16 for on-site product service or upgrades, have a method for setting up customer accounts, offer
17 an online “shopping cart” or provide any real-time means to order products. *Id.* Rather, these
18 social media sites primarily assist local customers by providing them with information about
19 the store’s physical address, directions on how to get to the physical storefront, contact phone
20 numbers, and store hours. *Id.* These social media web sites are not directed to customers in
21 Washington State. *Id.* ¶ 4.
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24 Computer Bay vehemently disavows any intent to install unlicensed or pirated software,
25 any knowledge of the installation of unlicensed or pirated software for its customers, or having
26 acted with any willful blindness to or in reckless disregard of Microsoft’s rights. Sales and
27 Service Technician Matt Rusch explains Computer Bay’s typical processes as follows: When
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1 the technicians diagnose, service and repair computers for Computer Bay customers, they
2 examine the components of the computers that customers bring in for service, and repair or
3 replace the computer's components as needed until the computer functions again. Dkt. #32 at ¶

4 3. On some occasions, service or repair of the identified problems requires Computer Bay to
5 wipe the computer's hard drive of all software and reinstall the software again after component
6 replacement or repairs have been made. *Id.*

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8 Before Computer Bay re-installed the customer's copy of a Microsoft product on a
9 wiped computer hard drive, the technician insisted that their customers provide an indicator the
10 product was a licensed and genuine Microsoft product. *Id.* at ¶ 4. These indicators included a
11 Microsoft OEM disk and a Microsoft Certificate of Authenticity ("COA") sticker on the
12 computer indicating that a legitimate copy of the Microsoft product had been previously
13 installed. *Id.* According to Mr. Rusch, Computer Bay only uses the customer's provided
14 media to re-install the original Microsoft software if these indicators of licensure or authenticity
15 are first provided. *Id.* If the customer does not or will not provide such indicators of licensure
16 or authenticity for a previously installed Microsoft product, Computer Bay offers to sell the
17 customer a new version of the software as a replacement. If the customer agrees to purchase
18 the new version, the technician installs it. *Id.* at ¶ 5. If the customer does not agree to purchase
19 a new version, Computer Bay returns the unrepaired computer to the customer. *Id.*

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22 Computer Bay's System Builders assemble new computers for retail sale. Dkt. #33 at ¶
23 3. Computer Bay installs and activates an operating system on each of these computers to
24 make them fully operational and functional. Dkt. #33 at ¶ 3. Computer Bay either activates or
25 assists the end user with each activation of the installed operating systems before the computers
26 are offered for sale to the public. *Id.* Mr. Chidichimo, one of Computer Bay's System
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1 Builders, has never observed any newly built computer with installed but unactivated Microsoft
2 products sold or provided to any members of the public without a COA being provided since
3 2003 when he started working at Computer Bay as a System Builder. *Id.*

4 Since 2012, the primary operating system software products re-installed or newly
5 installed on computers serviced at Computer Bay is Microsoft Windows 7 and Windows 8.
6 Dkts. #32 at ¶ 6 and #33 at ¶ 4. Computer Bay also re-installed or installed other Microsoft
7 products on computers serviced at Computer Bay, including various versions of Microsoft
8 Office. Dkt. #32 at ¶ 6. Computer Bay ordered and obtained all of its Microsoft software
9 products from Microsoft-approved vendors whenever a customer requested a new or
10 replacement Microsoft product be installed on a computer brought in for servicing or repair.
11 *Id.* and Dkt. #33 at ¶ 4. Each vendor of a Microsoft product provided Computer Bay with a
12 fully licensed version of the product, as evidenced by an accompanying COA and an Activation
13 Key. Dkts. #32 at ¶ 7 and #33 at ¶ 5.

14 III. DISCUSSION

15 A. Standard of Review for Motions Under 12(b)(2)

16 Federal Rule of Civil Procedure 12(b)(2) governs the dismissal of an action based on
17 lack of personal jurisdiction. Where a defendant moves to dismiss a complaint for lack of
18 personal jurisdiction, the plaintiff bears the burden of demonstrating that jurisdiction is
19 appropriate. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004). A
20 plaintiff cannot simply rest on the bare allegations of his Complaint, but rather is obligated to
21 come forward with facts, by affidavit or otherwise, supporting personal jurisdiction. *Amba*
22 *Marketing Systems, Inc. v. Jobar International, Inc.*, 551 F.2d 784, 787 (9th Cir. 1977). Where,
23 as here, the motion is based on written materials rather than an evidentiary hearing, the plaintiff
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1 need only make a *prima facie* showing of jurisdictional facts. *Schwarzenegger*, at 800.
2 Uncontroverted factual allegations must be taken as true. Conflicts between parties over
3 statements contained in affidavits must be resolved in the plaintiff's favor. *Id.* A *prima facie*
4 showing means that the plaintiff has produced admissible evidence, which if believed, is
5 sufficient to establish the existence of personal jurisdiction. *Ballard v. Savage*, 65 F.3d 1495,
6 1498 (9th Cir. 1995).

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8 Where no applicable federal statute addresses the issue, a court's personal jurisdiction
9 analysis begins with the "long-arm" statute of the state in which the court sits. *Glencore Grain*
10 *Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1123 (9th Cir. 2002).
11 Washington's long-arm statute extends the court's personal jurisdiction to the broadest reach
12 that the United States Constitution permits. *Byron Nelson Co. v. Orchard Management Corp.*
13 95 Wn.App. 462, 465, 975 P.2d 555 (1999). Because Washington's long-arm jurisdictional
14 statute is coextensive with federal due process requirements, the jurisdictional analysis under
15 state law and federal due process are the same. *Schwarzenegger*, at 800-01.

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17 The Due Process Clause protects a defendant's liberty interest in not being subject to
18 the binding judgments of a forum with which it has established no meaningful contacts, ties or
19 relations. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72, 105 S. Ct. 2174, 85 L. Ed.
20 2d 528 (1985). In determining whether a defendant had minimum contacts with the forum state
21 such that the exercise of jurisdiction over the defendant would not offend the Due Process
22 Clause, courts focus on the relationship among the defendant, the forum, and the litigation.
23 *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977).

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25 Personal jurisdiction exists in two forms, general and specific. *Dole Food Co. v. Watts*,
26 303 F.3d 1104, 1111 (9th Cir.2002). General jurisdiction exists over a non-resident defendant
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1 when there is “continuous and systematic general business contacts that approximate physical
2 presence in the forum state.” *Schwarzenegger*, at 801. In the absence of general jurisdiction,
3 the court may still exercise specific jurisdiction over a non-resident defendant. To establish
4 specific jurisdiction, the plaintiff must show that: (1) defendant purposefully availed itself of
5 the privilege of conducting activities in Washington, thereby invoking the benefits and
6 protections of its laws; (2) plaintiff’s claims arise out of defendant’s Washington-related
7 activities; and (3) the exercise of jurisdiction would be reasonable. *Easter v. American West*
8 *Financial*, 381 F.3d 948, 960-61 (9th Cir. 2004); *Bancroft & Masters, Inc. v. Augusta Nat’l*
9 *Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000).

11 1. General Jurisdiction

12 A defendant is subject to general jurisdiction only where the defendant’s contacts with a
13 forum are “substantial” or “continuous and systematic.” *Bancroft & Masters, Inc. v. Augusta*
14 *Nat’l, Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000). As the Ninth Circuit has recently noted,
15 “[g]eneral jurisdiction over a corporation is appropriate only when the corporation’s contacts
16 with the forum state ‘are so constant and pervasive as to render it essentially at home’ in the
17 state.” *Martinez v. Aero Caribbean*, 2014 U.S. App. LEXIS 16163, *8 (9th Cir. Aug. 21,
18 2014)(citation omitted). Plaintiff does not dispute that general jurisdiction is lacking in this
19 matter. Accordingly, the Court turns to whether it has specific jurisdiction.

22 2. Specific Jurisdiction

23 As noted above, in the Ninth Circuit, specific jurisdiction is analyzed using a three-part
24 test: First, the nonresident defendant must have purposefully directed his activities or
25 consummated some transaction with the forum or a forum resident, or performed some act by
26 which he purposefully availed himself of the privilege of conducting activities in the forum,
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1 thereby invoking the benefits and protections of its laws; second, the claim must be one which
2 arises out of or relates to the nonresident defendant's forum-related activities; and third, the
3 exercise of jurisdiction must comport with fair play and substantial justice, i.e., it must be
4 reasonable. If the plaintiff is successful at establishing the first two prongs, the burden shifts to
5 the defendant to set forth a compelling case that the exercise of jurisdiction would not be
6 reasonable.
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8 The first prong of the test is analyzed under either a "purposeful availment" standard or
9 a "purposeful direction" standard, which are two distinct concepts. *Washington Shoe Co. v. A-*
10 *Z Sporting Goods Inc.*, 704 F.3d 668, 672 (9th Cir. 2012). Generally for claims sounding in
11 contract, courts apply a "purposeful availment" analysis, asking whether the defendant has
12 "purposefully avail[ed]" itself of "the privilege of conducting activities within the forum State,
13 thus invoking the benefits and protections of its laws." *Schwarzenegger*, 374 F.3d at 802. For
14 claims sounding in tort, courts generally apply a "purposeful direction" test, looking to
15 evidence that the defendant has directed his actions at the forum state, even if those actions
16 took place elsewhere. *Schwarzenegger*, 374 F.3d at 802-03.
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19 To establish purposeful direction, the plaintiff must show that the defendant committed
20 an intentional act, expressly aimed at the forum state, causing harm that the defendant knows is
21 likely to be suffered in the forum state. *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1111 (9th
22 Cir. 2002) (citing *Calder v. Jones*, 465 U.S. 783, 788-89, 104 S. Ct. 1482, 79 L. Ed. 2d 804
23 (1984)). In cases involving allegations such as trademark infringement and misappropriation
24 the Ninth Circuit focuses on "purposeful direction," applying the "*Calder* effects" test. *Mavrix*
25 *Photo, Inc. v. Brand Technologies, Inc.*, 647 F.3d 1218, 1228 (9th Cir. 2011) ("Because
26 [plaintiff] has alleged copyright infringement, a tort-like cause of action, purposeful direction
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1 ‘is the proper analytical framework.’”); *Facebook, Inc. v. Pedersen*, 868 F. Supp.2d 953, 958
2 (N.D. Cal. 2012) (“The Court finds that the *Calder* effects test is the proper framework for
3 analyzing the exercise of specific personal jurisdiction over defendants, because [the plaintiff]
4 alleges trademark dilution and infringement, both of which are tort-like causes of action.”).

5 Defendant concedes that its acts of manually keying in 25-character alphanumeric
6 product keys to complete the activation process satisfies the first prong of the test –
7 commitment of an intentional act. Dkt. #31 at 6. However, Defendant argues that Plaintiff has
8 failed to establish the second *Calder* element – expressly aimed at the forum state – and has
9 therefore failed to satisfy the purposeful-direction prong of the Ninth Circuit’s test for specific
10 personal jurisdiction.
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12 Plaintiff argues that Defendants have purposefully aimed their activities at this forum
13 because they knew Microsoft was a resident of Washington, and because they both willfully
14 infringed Microsoft’s trademarks and copyrights and they made an affirmative statement to
15 Microsoft that the software was genuine and licensed which induced Microsoft to activate the
16 unlicensed software. Dkt. #29 at 10. Plaintiff relies exclusively on this Court’s recent decision
17 in another of Plaintiff’s infringement cases, involving identical allegations against a different
18 out-of-District Defendant. *See* Dkt. #29 at 10-11 (referencing *Microsoft v. Mountain West*
19 *Computers*, Case No. C14-1772RSM, Dkt. #37 (July 22, 2015)). However, Plaintiff’s reliance
20 on that decision is misplaced in the instant case.
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22 In *Mountain West*, this Court informed Plaintiff that the United States Supreme Court
23 has expressly rejected the idea that a defendant’s knowledge of a plaintiff’s forum connections
24 and the foreseeability of harm there are enough in themselves to satisfy the minimum contacts
25 analysis. *Microsoft v. Mountain West Computers*, Case No. C14-1772RSM, Dkt. #37 (July 22,
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1 2015) (citing *Walden v. Fiore*, 134 S. Ct. 1115, 1124-25, 188 L. Ed. 2d 12 (2014)). This Court
2 then determined that, while *Walden* acknowledges it does not address intentional torts
3 committed “via the Internet or other electronic means,” like the copyright claim at issue here,
4 *Walden*, 134 S. Ct. at 1125 n.9, the fact that the Supreme Court held that it would be a violation
5 of the defendant’s due process rights to be forced to submit to personal jurisdiction based
6 merely on his or her knowledge of the plaintiff’s location suggests that the high court’s holding
7 cannot be cabined to torts committed in the non-virtual world. *See Under A Foot Plant*, 2015
8 U.S. Dist. LEXIS 37596, 2015 WL 1401697, at *4 & n.1 (applying *Walden* to hold that
9 defendants publishing of copyrighted images on their website did not subject them to personal
10 jurisdiction). This Court further noted that in the only precedential Ninth Circuit decision
11 available at the time that applied *Walden*, the court held that personal jurisdiction in California
12 could not be based on statements a non-California resident made to another non-California
13 resident, even where those statements allegedly interfered with a sales contract held by the
14 California-based plaintiffs. *See Picot v. Weston*, 780 F.3d 1206, 1215 (9th Cir. 2015). The
15 court emphasized that the defendant’s alleged tortious interference was committed “without
16 entering California, contacting any person in California, or otherwise reaching out to
17 California,” and that the alleged injury – an inability to access out-of-state funds – was “not
18 tethered to California in any meaningful way” and “would follow him wherever he might
19 choose to live or travel.” *Id.*

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24 The same logic follows in the instant case. Importantly, unlike the Defendants in
25 *Mountain West*, the instant Defendant has not ordered products directly from any vendor
26 located in the forum state. Further, Plaintiff has produced no evidence that the servers accessed
27 by the instant Defendant are located in Washington. *See* Dkt. #30. Without more, and after
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1 *Walden*, the Court cannot find that Defendant's alleged actions are tethered in any meaningful
2 way to Washington.

3 **B. Venue and Estoppel**

4 Given that the Court has granted Defendant's motion to dismiss for lack of jurisdiction,
5 it will not address Defendant's venue or estoppels arguments.

6 **C. Sanctions**

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8 In its Reply, Defendant asks the Court to impose sanctions on the basis that Plaintiff
9 appears to have sued the wrong entity. Dkt. #31 at 12. Specifically, Defendant points to
10 Plaintiff's Response brief, wherein Plaintiff states that it has identified "hundreds of product
11 key activations by Computer Bay from more than a dozen related IP addresses, each of which
12 has characteristics consistent with software piracy." Dkt. #29 at 5 (emphasis added).
13 Computer Bay asserts that it has only five IP addresses and only uses one or two of those
14 addresses for product activations. Dkt. #32 at ¶ 16. On the record currently before it, and
15 given that Plaintiff has been unable to respond to this issue, the Court cannot meaningfully
16 address any request for sanctions and therefore denies Defendant's request.
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19 **IV. CONCLUSION**

20 Having reviewed the relevant pleadings, the declarations and exhibits attached thereto,
21 and the remainder of the record, the Court hereby finds and ORDERS that Defendants' Motion
22 to Dismiss (Dkt. #24) is GRANTED for the reasons discussed above. This matter is now
23 CLOSED.
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25 DATED this 28th day of August 2015.

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27 RICARDO S. MARTINEZ
28 UNITED STATES DISTRICT JUDGE